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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WESTERN STATES PETROLEUM ASSOCIATION;
NATIONAL OCEAN INDUSTRIES ASSOCIATION,
Petitioners,

v.

SONOMA COUNTY, SAN MATEO COUNTY,
MONTEREY COUNTY, SAN LUIS OBISPO COUNTY,
COUNTY OF SANTA CRUZ, CITY AND COUNTY OF
SAN FRANCISCO,
CITY OF MONTEREY, CITY OF MORRO BAY,
CITY OF SAN LUIS OBISPO and CITY OF SANTA CRUZ,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

PHILIP K. VERLEGER
(Counsel of Record)
DONNA R. BLACK
BRADLEY R. HOGIN
BAKER & HOSTETLER,
McCUTCHEN BLACK
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Counsel for Petitioners Western States Petroleum Association and National Ocean Industries Association

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. May a state (and, a fortiori, a city or county) forbid the use of land within its borders to process oil and gas produced in the federal outer Continental Shelf ("OCS") and forbid the use of land or activities within its borders to support production of oil and gas from the OCS, unless such use or activities are approved by a referendum?

2. Does a lawsuit challenging such ordinances become moot when the first such project loses a referendum, and its owners then seek to support their leases from an adjoining county, and (a) there are other leases being developed in the vicinity of the first project but at less advanced stages, (b) this suit is brought by a trade association, whose members hold some 50 federal leases offshore of cities and counties having such ordinances, which require onshore facilities to support exploration and development activities, and (c) the suit is joined by a trade association representing support contractors who will lose work if development does not go forward?

3. Is such a lawsuit ripe?

PARTIES

The parties to this case in the Court of Appeals were the two plaintiffs, the Western Oil and Gas Association, now known as the Western States Petroleum Association, and the National Ocean Industries Association; the ten defendants, Sonoma County, San Mateo County, Monterey County, San Luis Obispo County, County of Santa Cruz, City and County of San Francisco, City of Monterey, City of Morro Bay, City of San Luis Obispo and City of Santa Cruz; and the three intervenor-defendants, the State of California acting by and through the California Coastal Commission and the California State Lands Commission, Natural Resources Defense Council and The League for Coastal Protection. The companies holding membership in petitioners Western States Petroleum Association and National Ocean Industries Association are listed in App. L.

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PETITION FOR WRIT OF CERTIORARI

The Western States Petroleum Association and the National Ocean Industries Association hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 905 F.2d 1287 (9th Cir. 1990) (App. B). The opinion issued prior to rehearing is found at App. A. The district court's memoranda of decision (Apps. C and D) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1990. A timely petition for rehearing was denied on August 23, 1990, with an accompanying amendment of the opinion. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, in pertinent part provides:

> "It is hereby declared to be the policy of the United States that—
>
> (1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act;
>
> * * * *
>
> (3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;
>
> (4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environment—
>
> * * * *
>
> (C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for,

and development and production of, minerals of the outer Continental Shelf;

(5) the rights and responsibilities of all States, and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized;

. . . .

43 U.S.C. § 1332.

"(a) . . . . Any Governor of any affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan. Prior to submitting recommendations to the Secretary, the executive of any affected local government in any affected State must forward his recommendations to the Governor of such State.

* * * *

(c) . . . . The Secretary shall accept recommendations of the Governor and may accept recommendations of the executive of any affected local government if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State. For purposes of this subsection, a determination of the national interest shall be based on the desirability of obtaining oil and gas supplies in a balanced manner and on the findings, purposes, and policies of this Act. The Secretary shall communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations, or to implement any alternative means identified in consultation with the Governor to provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.

> (d) . . . The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of the affected State shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale or a proposed development and production plan in any suit or judicial review pursuant to section 23 of this Act, unless found to be arbitrary or capricious."
>
> 43 U.S.C. § 1345.

Section 1 of the ordinance of the County of San Luis Obispo provides in part:

> "No permit, entitlement, lease, or other authorization of any kind within the County of San Luis Obispo which would authorize or allow the development, construction, installation, or expansion of any onshore support facility for offshore oil and gas activity shall be final unless such authorization is approved by a majority of the votes cast by a vote of the people of the County of San Luis Obispo in a general or special election. For the purpose of this ordinance, the term 'onshore support facility' means any land use, installation, or activity required to support the exploration, development, production, storage, processing, transportation, or related activities of offshore energy resources."

Section 17.72.030 of the ordinance of the City of Morro Bay provides in part:

> "There shall be no construction, reconstruction, operation or maintenance of any commercial or industrial facility within the City, including but not limited to business or personnel offices, oil or gas storage facilities, pipe, drilling materials, or equipment repair or storage facilities, or any other aid or support, which operates directly or indirectly in support of any offshore oil or gas exploration, development, drilling, pumping or production; nor shall there be any construction, reconstruction, operation or maintenance of any pipeline within the City for the trans-

> mission of any oil or natural gas taken or removed from any offshore oil or gas drilling or pumping operations."

Section 17.92.020 of the ordinance of the City of San Luis Obispo provides in part:

> "No onshore support facility for offshore oil or gas development shall be allowed or permitted within the City of San Luis Obispo until such time that the City Council proposes the inclusion of such uses in an appropriate zone district or districts, and such proposal has been approved by a vote of the people of the City of San Luis Obispo. For the purpose of this ordinance, the term 'onshore support facility' means any activity or land use required to support directly the exploration, development, production, storage, processing, transportation, or related aspects of offshore energy resources extraction."

STATEMENT OF THE CASE

This is a case which challenges ordinances intended to prevent the development of federal offshore oil and gas leases by denying lessees the right to bring the oil and gas onshore. The immediate problem is that the district court and the Court of Appeals have used concepts of Article III ripeness and mootness to close the door to any reasonably possible challenge, thus effectively validating the ordinances.

Petitioner Western States Petroleum Association ("WSPA") is a trade association including in its membership substantially all of the companies engaged in oil and gas exploration and production on the outer Continental Shelf ("OCS") offshore of California. Petitioner National Ocean Industries Association ("NOIA") is a trade association representing substantially all of the companies and individuals who provide drilling, provisioning and other essential services to offshore operations. This action, brought by the two trade associations (collectively referred to herein as "WSPA"), challenges

an ordinance of the County of San Luis Obispo which provides that no permit may be issued for any land use which supports offshore oil exploration, development or production unless the permit in question is approved by a referendum of the citizens of the County. The City of San Luis Obispo and the City of Morro Bay, relevant here because of their role as logistical support bases for operations offshore San Luis Obispo County, have adopted similar ordinances.

WSPA's member companies are the owners of upwards of 50 oil and gas leases offshore San Luis Obispo County and have paid approximately $2.4 billion for these leases. App. H at 85a. Several of these companies own what is known as the San Miguel project, operated by a subsidiary of Shell Oil Company ("Shell"), located on lease OCS-P 0409. After all applicable permits were obtained but before a referendum was held on the San Miguel project, as required by the San Luis Obispo ordinance, the district court ruled (a) that the case was not ripe, resting its decision at least in part on the fact that no project had thus far lost an election, and (b) that the ordinance was valid. App. C at 46a-50a. Shortly following that decision, an election was held and the project was defeated. App. F at 61a-62a. WSPA filed a motion to reconsider and for leave to file a second amended complaint alleging loss of the election which was denied on the ground the election made no difference. App. D at 54a.

On appeal, the Ninth Circuit remanded the San Luis Obispo portion of the case to the district court for further findings, reciting that the record suggested that the San Miguel project is now being serviced from Santa Barbara and therefore that the case might be moot. The Court of Appeals' decision thus necessarily decided that the pendency of the leases held both for this project and for other projects in San Luis Obispo was not enough: it was necessary that there be a current "proposed de-

velopment" pending in San Luis Obispo County before that County's ordinance could be challenged.

That decision creates a critical need for review by this Court. The principles adopted, which form the basis for the direction to the district court to make additional findings, would establish criteria which necessarily completely defeat any prospect of challenging these ordinances. Ownership of affected leases even with ongoing development is passed over as a ground for standing or ripeness. A current project to come ashore is needed, but is only a basis for challenging an ordinance after an election is held. Once defeated, the current project will not suffice if some other solution is subsequently pursued. The result is that there is no window of opportunity to sue. Such a holding would defeat the long-established policy of the United States which mandates development of the OCS.

Oil is of no use to anyone if it cannot be brought ashore. If the holders of leases have to spend the amounts required to explore them, knowing all the time that they have to win a referendum (an improbable event) before they can possibly do anything with the oil they are searching for, the question arises: why search? An enormous obstacle to the development of the federal leases is thus placed in their path. Assuming, after lessees have gone through the permitting process, lost an election, and then been forced to look around for some other alternative, that they are at that point also precluded from challenging the ordinance, then such an ordinance becomes unchallengeable. Given the adoption by Congress of policies requiring the development of such leases, this is a plain, significant and most destructive assault on federal power.

A. Background

It is surely no news that while on the one hand, federal statutes speak in no uncertain terms of the import-

ance of the development of the OCS, there is an almost universal desire that such development take place somewhere else. The result is an inevitable conflict between federal authorities and oil companies on the one hand, and local jurisdictions who do not want such development on the other hand. Such conflicts have had a long judicial history in both this Court and the Court of Appeals: a few of the cases are *Secretary of the Interior v. California*, 464 U.S. 312, 104 S.Ct. 656, 78 L.Ed. 2d 496 (1984); *Natural Resources Defense Council v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988); and *State of California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979).

This case arises out of the adoption, in the late 1980's, of similar ordinances in every California county along the coast except for Santa Barbara, Ventura, Los Angeles and parts of Orange County. These ordinances fall into two categories. They either (a) forbid outright the bringing of oil produced offshore onto the land, or (b) require that permits for facilities to bring such oil ashore be subjected to a referendum. Texts of the ordinances appear in App. J at pages 110a through 188a.

The purpose of these ordinances has been announced by their proponents in very straight-forward terms. Hostility to offshore development is the theme: the basic text is that while the federal government may control the water, the states and local governments control the land. For example, the Santa Cruz County ordinance provides that:

> "The citizens of Santa Cruz County have no legal way directly to control offshore oil and gas exploration or development, since oil and gas developments which occur offshore are under the jurisdiction of the federal government. The citizens of Santa Cruz County do, however, have the legal ability to make significant decisions about onshore facilities which support offshore oil and gas exploration and development."
>
> App. J at 161a.

In the words of a principal advocate of these ordinances: "There will be nowhere they [oil producers] can come ashore. It [the ordinance] sends that message loud and clear." ER 35 at Ex. C ("ER" refers to the record excerpts on appeal). "Strong opposition to any oil or gas drilling" is the stated purpose of the Monterey ordinance (App. J. at 168a); the Sonoma County ordinance expresses "strong current opposition . . . to proposed offshore oil developments." App. J at 111a. There has been a wave of such ordinances adopted, which probably has not yet reached its peak.

Of these various ordinances, only three—in San Luis Obispo County, the City of San Luis Obispo and the City of Morro Bay—directly affect current lessees of the United States. It is those leases and those ordinances which give rise to the issues here. However, the other ordinances are important, too. What is involved is an attempt to wall off oil produced from federal leases from the Mexican to the Oregon border: this is nothing less than a threat of nullification of an Act of Congress along almost the entire coastline.

B. Proceedings Below

The case was decided in the district court on defendants' motion to dismiss plaintiffs' first amended complaint and on plaintiffs' motion for summary judgment. The district court granted the motion to dismiss the complaint and denied the summary judgment motion. App. C at 46a-50a. The first amended complaint alleged the representative status of WOGA, now WSPA, and NOIA. Defendants in the case as filed were (a) the cities and counties with ordinances forbidding outright the presence of support facilities onshore for offshore operations, including the City and County of San Diego and the City of Oceanside, and (b) the cities and counties which require that every permit for construction or use of any facility for onshore support of any offshore

facility be approved by voters in a referendum, including Sonoma County, San Mateo County, Monterey County, San Luis Obispo County, Santa Cruz County, City and County of San Francisco, City of Monterey, City of Morro Bay, City of San Luis Obispo and City of Santa Cruz.

As to San Luis Obispo County (and the City of Morro Bay and City of San Luis Obispo), it was alleged that WSPA members are the owners of upwards of 50 leases offshore of that County and have expended more than $2.4 billion for purchase of the leases. App. H at 85a. It was alleged that onshore pipelines, treatment facilities and logistic bases in the defendant areas are essential for production of oil and gas from these leases. App. I at 93a-94a; 96a-97a.

It was also alleged that a group of WSPA members operate what is known as the San Miguel project; that a platform had been built at a cost of $160 million for production from the lease; and that necessary permits had been applied for from the County of San Luis Obispo for the project. *Id.* at 97a. It was further alleged, under the County's ordinance requiring a vote, that the project was to be submitted to an election and that the result was a threatened loss of the entire investment and a certain delay of at least a year at a cost of approximately $14 million. *Id.* at 97a. It was further alleged that there are following behind at least five additional projects on which discoveries have been made off San Luis Obispo County in other groups of leases. *Id.*

As to the other counties, it was alleged that federal offshore lease sales were pending at which plaintiffs' members had the right to bid and that substantial amounts had been invested in preparing for these sales. *Id.* at 97a-98a. It was further alleged that since oil that cannot be brought ashore is without value, the effect of the ordinances was to destroy or impair the right to bid. *Id.*

Violations of the Supremacy Clause, the Commerce Clause, the Due Process Clause and the Equal Protection Clause were pleaded. *Id.* at 99a-109a. The first amended complaint was accompanied by a motion for summary judgment seeking a determination that the ordinances were invalid, which was supported by declarations making essentially the same statements as the complaint, albeit in greater detail. It was opposed by declarations from defendants addressing possible problems from the presence of onshore facilities; asserting that there are places in California where such facilities could be built; and further asserting that it is possible to operate offshore without coming onshore by producing into a floating storage and treatment system. ER 62. There was no response, however, to the allegation in the complaint that because of local and state opposition, use of such a system is generally precluded. There was also no response to plaintiffs' assertion that natural gas is a significant part of the offshore production and must come directly onshore. App. H at 84a. The United States lodged an amicus brief supporting plaintiffs. Leave to file the United States' brief was denied because of the late date of the filing. ER 91.

The district court denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss except as to the City and County of San Diego and the City of Oceanside.[1] As to all other counties, the district court concluded (a) that the ordinances were valid, and (b) in the alternative, that the controversy was not

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[1] These cities and San Diego County have ordinances absolutely prohibiting the construction of any facilities and the importation of any petroleum produced from within 100 miles of their borders on the OCS. The district court ruled that whether or not those ordinances were valid was dependent on whether there was any less drastic method of accomplishing their objectives. The case as to these ordinances was severed pursuant to Fed. R. Civ. Pro. 42(b) and is not involved in this appeal. It has been stayed pending a decision in this case.

ripe because no one had thus far lost an election and because, even then, losers could pursue other possible remedies, principally review of an adverse municipal decision by the California Coastal Commission.

Before the judgment was final, the group of WSPA companies with applications pending before the County of San Luis Obispo lost the election on its project and was therefore denied permits. Plaintiffs thereafter filed a motion for leave to file a second amended and supplemental complaint setting forth that loss and a motion to reconsider the prior decision. ER 101. Under date of September 6, 1988, the district court denied both motions and issued a final judgment. App. D. A Notice of Appeal was filed under date of October 28, 1988. ER 119.

After the case was on appeal, the President issued an order suspending the previously scheduled lease sales offshore of California, which order was followed by an Act of Congress declaring a moratorium on all such sales which was recently renewed. This left San Luis Obispo County (and the cities of San Luis Obispo and Morro Bay within that County) as the only involved area with active leases off the coast. Since, as to the other counties (all north of San Luis Obispo), the economic harm to plaintiffs' members consisted of deprivation of the right to bid at lawfully scheduled federal sales, plaintiffs/appellants moved to dismiss as moot the appeals as to all cities and counties other than San Luis Obispo, the City of San Luis Obispo and the City of Morro Bay. On this issue, the Court of Appeals ruled that the actions were not moot, because of the possibility of a recurrence of the controversy, but that in view of the fact that there were no lease sales pending, the actions were plainly not ripe as to the northern counties and on that ground affirmed the district court. App. A at 7a-8a. On petition for rehearing (denied), it vacated the judgment on the merits as to those counties. App. B at 18a. For purposes of this petition, we do not challenge that ruling.

As to the County of San Luis Obispo, the Court of Appeals expressed a belief that there was material in the record which suggested that the San Miguel project proponents had abandoned the effort to come ashore in San Luis Obispo County and were "servicing the leases" from Santa Barbara County to the south. It sent the case back to the district court for findings on that subject, as determinative of mootness. By so ruling, the court decided that those who hold leases from the United States offshore of San Luis Obispo County do not have a ripe controversy if they have not yet reached the stage of an actual project submitted to the County (otherwise the status of the San Miguel project could not moot the case). Accordingly, the judgment was affirmed without comment as to the cities of San Luis Obispo and Morro Bay, where there are no permit applications pending. In addition, the Court of Appeals' decision says, in effect, that the proponents of a project actually submitted and lost in such an election will be mooted out, either if they simply stop, or if they try to pursue some other solution while continuing with their lawsuit.

REASONS FOR GRANTING THE WRIT

I. THE NATIONAL INTEREST URGENTLY DEMANDS A PROMPT RESOLUTION OF THIS CONTROVERSY

Estimates of the amount of oil to be found in and to be produced from the OCS off California vary widely. The Department of Energy's estimate of four billion barrels in reserves (*i.e.*, enough to produce close to a million barrels a day for 10 to 15 years) is pleaded in the complaint. App. I at 93a. A declaration supporting the complaint estimated that potential reserves may be as high as ten billion barrels. ER 12 at 6. Until exploration is complete, all estimates are, at best, enlightened guesses. But there is no doubt reserves are substantial. Whatever the numbers may be, Congress has stated in

the plainest of terms that the national policy requires the development of these resources. The OCSLA thus recites:

> "It is hereby declared to be the policy of the United States that—
>
> (3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs . . . ."
>
> 43 U.S.C. § 1332.

The national interest in this lawsuit was articulated in the amicus brief filed by the United States in the Court of Appeals, at p. 3.

> "The United States has a significant interest in the development of the OCS. In addition to reducing our nation's dependence on foreign sources of oil (see 43 U.S.C. 1801(3) and 1802(1)), OCS oil and gas resources off California have provided substantial benefits to the treasuries of both the United States and California."

The OCSLA recognizes the importance not only of development but of simultaneous protection of the environment and provides an elaborate mechanism for accomplishing this. 43 U.S.C. §§ 1346, 1351. Likewise, the OCSLA provides for a reconciliation of local interests, which tend to oppose development, to the national interest. In this regard, the Act requires submission of the federal plans to the Governor of the affected state and provides a mechanism for adjusting differences of opinion between the Secretary of Interior and the State. *Id.* at § 1345. Only after that process is fully pursued is a particular lease sale permitted. But the Secretary of the Interior is most specifically authorized and directed to conduct such sales. *Id.* at § 1334.

If one has any doubts as to the significance of that policy, one need only read the daily newspapers. This Court is well aware that Iraq's invasion of Kuwait and the responsive boycott of Iraqi and Kuwaiti oil by the entire world community have cut several million barrels a day out of the world's oil supply. The result is that crude oil prices in the world markets have jumped by 100%. Actual deficits in supply giving rise to lines in service stations and unfilled heating oil demands have thus far narrowly been averted. If the crisis goes farther and embraces Saudi Arabia, however, what has happened so far will be a comparative picnic.

This is not the first such crisis and it will not be the last. The United States went through a similar set of problems in the early 1970's with the Arab oil boycott, again with the overthrow of the Shah of Iran and again as a result of the war between Iran and Iraq. Without further belaboring the point, we submit that the federal government has had every reason to show the concern over "expeditious and orderly development" of the OCS so plainly expressed in the OCSLA. This in turn means there is every reason, in the national interest, to urge the earliest possible resolution of the validity of local ordinances that say to the federal government, issue leases off our shores if you wish, but your act will be futile because your lessees will not be able to bring the oil ashore.

II. THE EFFECT OF THE COURT OF APPEALS' DECISION IS PRACTICABLY TO FORECLOSE CHALLENGE OF THE SUBJECT ORDINANCES

The decision below effectively decides that possession of a lease is not sufficient to enable a company to challenge these ordinances, even if enormous amounts have been spent on purchase, exploration and development of the lease. Before one has the right to challenge San Luis Obispo's ordinance, for example, one must have a specific "proposed development" in the County.

Despite the showing made in the district court (without challenge) that WSPA members hold many active lease offshore of San Luis Obispo County, the Court of Appeals discussed only the San Miguel project. It observed that Shell had lost the election and that the election had been "nullified" by the County for reasons that "were not clear." The court then referred to a mention in the record which suggested that Shell had therefore shifted its attentions to Santa Barbara County and sent the case back to the district court for further detail on that subject, saying that the record "suggests that the controversy including Shell's lease may be moot." App. B at 18a. It also observed that there was "no other development proposed." App. B at 18a. It affirmed the dismissal without separate comment as to the City of Morro Bay and the City of San Luis Obispo.

By so doing, the court decided that the holders of the other leases off San Luis Obispo, despite their investments and despite the fact that this was the place they had chosen to come ashore, could not challenge the ordinance. On petition for rehearing, WSPA expressly pointed out, even though the Court of Appeals in its initial opinion had observed that there were "no leases" offshore of the northern counties and therefore no ripe controversy (*see* App. A at 7a), that there unquestionably were active leases off San Luis Obispo County. There was no direct response to this in the amended opinion issued on rehearing. Despite this, the decision clearly stands for the proposition that leases are not enough: there must be a "development" which has reached the permit application stage. Were that not the ruling, the case could not have been affirmed as unripe as to the cities of San Luis Obispo and Morro Bay, and with respect to all leases offshore of the County except the lease involved in the San Miguel project.

The problem with this analysis is that, after Shell's experience, it is clear that there is no rational prospect of winning an election in San Luis Obispo County. In-

deed, given the popular convictions expressed in the ordinances themselves, there is probably no prospect of winning such an election in any of these cities or counties. That being so, no rational management is going to pursue a project to come ashore there. The companies, inevitably, will make their judgments as to the economic feasibility of development on the basis of coming ashore in Santa Barbara County or somewhere further south. While getting approval in those areas has its own particular difficulties, and those difficulties coupled with the distances between the project and the support base may make such projects uneconomic, there is at least no outright prohibition and no requirement of a referendum on every permit. But the result is that the ordinances will accomplish their objective of closing the door to San Luis Obispo County and its cities and yet never be subject to challenge.

The case of the San Miguel project adds to the outrageousness of the result. The only purpose expressed for sending the case back to the district court for findings on the state of the project with respect to Santa Barbara County is to find out if the case would be "moot." But, we submit, what else is a company to do having gone down to defeat in San Luis Obispo County? For whether or not the election was "nullified" as the Court of Appeals says hardly matters: the election sufficiently demonstrated the popular will. Further efforts in San Luis would plainly be a waste of time and would cost a great deal of money. And why indeed should the companies be precluded from "servicing" a lease from an adjacent county, pending a determination of the validity of the ordinance which kept them out of San Luis Obispo in the first place? The effect of the ruling is to prevent a challenge permanently. The loser of the election will be mooted out: others will never reach the stage of applying because they cannot win. This is a result totally contrary to the rulings of this Court.

III. THE ORDINANCES ARE VOID ON THEIR FACE UNDER THE SUPREMACY AND COMMERCE CLAUSES

It is well-established that a state or county may not throw up a wall designed to keep out oil produced on the OCS. Fundamental barriers exist to any such set of ordinances both under the Supremacy Clause and the Commerce Clause. Under the Supremacy Clause, a state or local ordinance which has the effect of frustrating a federal policy is plainly invalid. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698, 104 S.Ct. 2694, 81 L.Ed. 2d 580 (1984); *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 260, 105 S.Ct. 695, 83 L.Ed. 2d 635 (1985); *Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 156, 102 S.Ct. 3014, 73 L.Ed. 2d 664 (1982).

Equally applicable is the rule which denies to the states the power to wall out interstate commerce. *Hicklin v. Orbeck*, 437 U.S. 518, 531-34, 98 S.Ct. 2482, 57 L.Ed. 2d 397 (1978); *Pennsylvania v. West Virginia*, 262 U.S. 553, 595-600, 43 S.Ct. 658, 67 L.Ed. 1117 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 260, 31 S.Ct. 564, 55 L.Ed. 716 (1911). There can be no doubt that transportation of oil from the OCS into the states is interstate commerce.[2] *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 2d 576 (1981).

We recognize that, rather than decide the merits, the Court of Appeals vacated the district court's judgment

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[2] Defendants attempted to evade this issue by urging that state production from within the three mile limit offshore is also embraced. However, there have been no state leases offered in California for thirty years. There are no new state projects and there will be none under California legislative and administrative policies. The only application of the ordinances is to interstate commerce.

on the merits, dismissing all aspects of the case other than the "Shell lease" as unripe. By so doing, the Court of Appeals eliminated the possibility that the district court opinion would be res judicata except possibly (depending on future action) as to the "Shell lease." But that action leaves the district court opinion as the only judicial expression on the topic and it will therefore be the only authority to which anyone seeking to develop offshore can refer. By effectively preventing any challenge to the ordinances at any practicable time, the Court of Appeals has permanently preserved the result of the district court decision. Under the circumstances, we respectfully urge that this Court grant certiorari to resolve both the merits and the issue of mootness/ripeness.

IV. THE COURT OF APPEALS IS PLAINLY IN ERROR WITH RESPECT TO MOOTNESS

The Court of Appeals sent the case back to the district court for further factual development relevant to mootness. It said:

> "Offshore of San Luis Obispo, Shell Oil Company, a member of appellant WOGA, has obtained an OCS lease which it originally proposed to develop and service with onshore facilities in San Luis Obispo County. At one point, Shell applied for a permit under the San Luis Obispo ordinance which appears to have been denied by a popular vote. The election was nullified by the County, however, for reasons that the record does not make clear. The record suggests that Shell has abandoned the San Luis Obispo project, that no other development has been proposed, that a new vote was never held, and that the offshore San Luis Obispo lease is now being serviced from onshore facilities in Santa Barbara County. Although the record suggests that the controversy involving Shell's lease may be moot, we cannot be certain because the relevant facts are not adequately developed in the record before us. Accordingly, we

remand the question of mootness with respect to Shell's lease offshore San Luis Obispo County."

App. B at 18a.

The difficulty with all this is that the findings requested have little to do with mootness. The showing here indubitably establishes such injury. The Court of Appeals itself recognized, in dealing with the northern counties, that likelihood of recurrence is the criterion for mootness and found that the lawsuit as to the other counties was not moot, because of the possibility of the recurrence of the same controversy. It said:

"We agree with appellees that actions are not moot when the issues they concern are likely to recur. Our court has consistently held that when a controversy is an on-going one, the case has not become moot. In *Gary H. v. Hegstrom*, 831 F.2d 1430, 1431 (9th Cir. 1987), we held that a case had not become moot because, despite growing accord between the parties, continuing controversy remained. Earlier, we held in *Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 1130 (9th Cir. 1976), that a defendant's voluntary cessation of wrongdoing did not render the case moot because it provided no assurance that the alleged wrongdoing would not recur. Both these cases support the more general proposition that when the possibility of controversy remains, the case is not yet moot. The Third Circuit has explicitly held that 'an appeal will not be deemed moot if there is a reasonable likelihood that the parties will contest the same issues in a subsequent proceeding.' *Hooker Chem. Co. v. EPA*, 642 F.2d 48, 52 (3d Cir. 1981) (citing *Klein v. Califano*, 586 F.2d 250, 255-56 (3d Cir. 1978) (en banc)). We agree with the position of the Third Circuit and hold that because appellants concede that contested issues could arise again, controversy still smolders. The case, therefore, cannot be moot."

App. B at 15a-16a.

There are no leases offshore of the other counties. The possibility of recurrence exists as to those counties because plans to offer such leases have been approved and stand to be implemented someday, even though those plans are currently stalled by the leasing moratoria. It simply cannot be true that the case of the northern counties (where there are no leases) is not moot because of the possibility of lease sales while the controversy as to San Luis Obispo is moot even though there are existing leases currently undergoing development.

To start with, it is fundamental, as this Court itself has observed, that a lawsuit is not moot if the problem is capable of repetition and a decision on mootness would defeat review. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-400, 100 S.Ct. 1202, 63 L.Ed. 2d 479 (1980); *Weinstein v. Bradford*, 423 U.S. 147, 149, 95 S.Ct. 2394, 44 L.Ed. 2d 664 (1975); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911). And, where a case is brought in a representative capacity on behalf of a class or group of plaintiffs, the probability of recurrence is determined by reference to the entire class. Thus, in *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed. 2d 532 (1974), this Court had before it a class action challenging Iowa's residency laws for divorce. By the time the case reached the Supreme Court, the plaintiff had been in Iowa long enough to meet the residency requirement. This Court concluded the case was not moot, because appellant "sought to litigate the constitutionality of the durational residency requirement in a representative capacity." *Id.* at 399. In *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 752-57, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976), this Court went farther and allowed the representative action even where the individual representative himself had been shown to have no claim.

This is a representative action brought on behalf of the industry as a whole. WSPA and NOIA sue by virtue

of the right of an association to bring suit if its members suffer or are threatened with injury. *See Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed. 2d 383 (1977); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975); *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D. Cal.), *aff'd* 609 F.2d 1306 (9th Cir. 1978). It is alleged in the complaint and not denied that there are outstanding leases held by WSPA's members and numerous service companies who are deprived of the opportunity to work on those leases, represented by NOIA. The complaint further alleges that discoveries have been made in at least five different units formed of those leases and that projects are ongoing. App. I at 97a. On the motion for summary judgment, the Henderson Declaration identified another project, the Lion Rock Unit, which was in progress. App. H at 86a. It was set forth that the elimination of local onshore facilities is effectively a prohibition of offshore operations. *Id.* Such facilities are needed, not only for processing of produced oil, but as logistical support, *e.g.*, helicopter and boat bases for exploration activities which take place before development. *Id.* at 87a. Under *Sosna v. Iowa*, *supra*, and *Franks v. Bowman Transportation Company*, *supra*, the concept of mootness has no application in this case.

V. THE COURT OF APPEALS' DECISION IS EQUALLY INCONSISTENT WITH THE LAW APPLICABLE TO RIPENESS

While the Court of Appeals spoke of "mootness," it seems to us more likely that what it probably had in mind was concepts of ripeness. The statement that there are "no other developments" has little to do with mootness, but suggests that the appellate court was of the view that except for the Shell project, the case is not ripe. Indeed, that is the only possible ground for affirming the lower court ruling as to the City of San Luis Obispo and the City of Morro Bay.

The classic decision of this Court on the subject of ripeness is *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967). *Abbott Laboratories* dealt with a situation in which the Food and Drug Administration wrote a letter to companies throughout that industry threatening criminal prosecution if the companies proceeded in a certain way. The Court held that was sufficient to establish a ripe controversy, based on the criteria established in that case of the fitness of the issues for judicial consideration and the hardship to the parties of avoiding judicial review. 387 U.S. at 148-49. WSPA believes that both of the criteria in *Abbott Laboratories* are plainly satisfied as to San Luis Obispo County and the cities of San Luis Obispo and Morro Bay within the County.

First, an issue of law—the validity of an ordinance—is presented. That alone goes a long way toward establishing ripeness. Second, there is genuine hardship. The ordinances require that companies who wish to install facilities after completing all of the normal complex and burdensome permit requirements must submit the permit finally obtained to a referendum and go forward only if they win. The determination of the final issuance of a permit on that basis is at best a dice game and at worst a certain loser. Particularly with Shell's experience in mind, every applicant will recognize that whatever luck he has working through the City or County Planning Department and the Board of Supervisors or City Council thereafter (a process which by itself takes years and requires millions in engineering costs), it is singularly unlikely that he will survive the final challenge in the electorate. At best, he knows that the result is highly uncertain. He also knows that the result will depend on the degree of local hostility to offshore development itself and not on the merits or demerits of the onshore portion of the project. What he will have before him is

in effect a referendum on the validity of Congress' policy for developing the OCS. That is what happened to Shell, this is doubtless what will happen the next time. If an applicant cannot challenge such an ordinance before he embarks on that course, he is unlikely ever to embark on it at all.[3]

This is thus a case directly on point with this Court's decision in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed. 2d 752 (1983) ("PG&E"). In that case, this Court had before it two sections of the California Public Resources Code dealing with nuclear energy. The first section provided that before additional nuclear power plants were built, the State Energy Commission had to determine, on a case by case basis, whether there would be adequate capacity at the new plants for short-term storage of spent fuel rods. The second section declared a general moratorium on the certification of new plants until a finding had been made that an appropriate technology or means for the disposal of high-level nuclear waste had been developed. Both were challenged under federal policies providing for nuclear regulation and under federal statutes favoring nuclear development. This Court found that the controversy was ripe as to the prohibition (moratorium) against construction of nuclear power plants until a permanent repository was established. The Court specifically found that postponing review would "work substantial hardship" on the plaintiff utilities. That particular hardship is exactly what he have here. The Court stressed that:

> "As the Court of Appeals cogently reasoned, for the utilities to proceed in hopes that, when the time

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[3] It is notable in that connection that Shell had nearly completed the permit process when the ordinance requiring the referendum was adopted.

> for certification came, either the required findings would be made or the law would be struck down, requires the expenditure of millions of dollars over a number of years, without any certainty of recovery if certification were denied. The construction of new nuclear facilities requires considerable advance planning—on the order of 12 to 14 years. Thus, as in the *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974), 'decisions to be made now or in the short future may be affected' by whether we act. 'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impeding that is enough.' *Id.* at 143, quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). To require the industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship on the utilities . . . ."
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> 461 U.S. at 201-202.

Like the public utilities in the *PG&E* case, WSPA members must spend considerable time and expense—measured in terms of many years and millions of dollars —in developing leases to the point where permits for onshore facilities can be presented to the electorate for approval. This is an expense which is totally wasted if the election is lost. There has been only one election so far, and it was lost. This uncertainty is enough to render the issue ripe for review under the *Abbott Laboratories* and *PG&E* decisions.[4]

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[4] The District of Columbia Court of Appeals has held that where a matter clearly satisfies the *Abbott Laboratories* "fitness" test, lack of hardship ". . . cannot tip the balance against judicial review," and the court consequently "need not consider" whether the claimant would suffer any hardship from postponing review. *Air Transport Ass'n of America v. Dept. of Transportation*, 900 F.2d 369, 374 (D.C. Cir. 1990); *Consolidated Rail Corp. v. United States*, 896 F.2d 574, 577 (D.C. Cir. 1990). The Court of Appeals decision

In contrast, the Court in *PG&E* found the short-term storage capacity determination issue to be unripe. The Court reasoned that "there is little likelihood that industry behavior would be uniquely affected by whatever uncertainty surrounds the interim storage provisions." 461 U.S. at 203. There was no reason to believe that permits for reasonable storage would be denied and none had been. To the contrary, total uncertainty—or a negative certainty—will continue to surround the San Luis Obispo leases. Moreover, the simple holding of the referendum, since it is almost inevitably a referendum over voter satisfaction with or hostility to federal policies for the development of the OCS, amounts to a practical transfer of jurisdiction over such development on the OCS from the United States to the local electorate. Such jurisdiction is plainly reserved to the United States. 43 U.S.C. § 1332.

CONCLUSION

WSPA submits that the ordinances challenged here are unconstitutional on their face. The ordinances are intended to prevent implementation of the federal policy for expeditious and orderly development of the OCS. They build a wall against a particular kind of interstate commerce. Because of the seriousness and national importance of this issue, we respectfully urge that this Court grant certiorari on the entire case as addressed by the district court. If, however, the Court should grant certiorari on the issues of ripeness and mootness only (the issues covered by the Court of Appeals), then we would respectfully ask this Court to consider whether this is not one of those rare cases in which it is appro-

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here is in conflict with that view and thus this Court should grant review in order to resolve the conflict.

priate to grant certiorari and remand summarily with directions to consider the merits.

Respectfully submitted,

PHILIP K. VERLEGER
(Counsel of Record)
DONNA R. BLACK
BRADLEY R. HOGIN
BAKER & HOSTETLER,
McCUTCHEN BLACK
600 Wilshire Boulevard
Los Angeles, California 90017
(213) 624-2400
Counsel for Petitioners
Western States Petroleum
Association and
National Ocean Industries
Association

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